

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

JOSEPH O'BRIEN,

Plaintiff and Respondent,

v.

ROLLING HILLS PLASTICS, INC.,

Defendant and Appellant.

B218179

(Los Angeles County
Super. Ct. No. BC386776)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Morris Jones, Judge. Reversed.

Law Offices of Joel F. Tamraz and Joel F. Tamraz for Defendant and Appellant.

Law Offices of Scott E. Schutzman and Scott E. Schutzman for Plaintiff and
Respondent.

After their employment relationship ended, Plaintiff/Respondent Joseph O'Brien sued his former employer, Defendant/Appellant Rolling Hills Plastics, Inc. (RHP), for violation of Labor Code section 970¹ – he claimed he was induced by knowingly false representations to move to California for employment with RHP – and for intentional infliction of emotional distress (IIED). Over the course of a three-day bench trial, the trial court granted RHP's motion for judgment on O'Brien's cause of action for IIED, and found that RHP had violated section 970. The trial court awarded damages to O'Brien in the amount of \$33,859, doubled to \$67,718 pursuant to section 972. On appeal, RHP contends there was no substantial evidence supporting judgment in favor of O'Brien on his Labor Code claim. We agree.

FACTS

RHP is a small business dealing in sales of plastic sheeting. In early 2007, Patricia Conkling, RHP's owner and chief executive officer, began a search for a "high profile" sales executive to grow the company's business. At about the same time, O'Brien had posted a resume on "Theladders.com," highlighting his roles as a "business development executive" with extensive experience in sales for plastic packaging products. After seeing his resume, Conkling contacted O'Brien concerning a possible position with RHP. O'Brien initially informed Conkling by email that he would require a salary of \$120,000. The two parties exchanged more emails. Although the subject line of the initial email sent to O'Brien indicated that RHP was extending a "COMPENSATION OFFER FOR THE PERIOD OF 08/01/2007 UP TO 07/31/2008," O'Brien did not assent to the terms that RHP had set out in its email; instead, he sent back questions and suggestions for different terms of employment. In a subsequent email to O'Brien, Varouj Charkhedian, RHP's controller, made clear that RHP did "not do employment contracts with employees" since it is such a small company.

¹ All further statutory references are to the Labor Code.

In September 2007, O'Brien began working for RHP notwithstanding that he and RHP had not finalized a formal employment contract. O'Brien continued to work at RHP until sometime in January 2008. The undisputed evidence at trial showed that, during his employment with RHP, O'Brien failed to bring in any significant business or sales. On January 5, 2008, O'Brien's superior at RHP, Fred Conkling, Jr., called O'Brien to inform him that RHP could no longer afford his salary and would have to reduce his salary until he raised his sales numbers. O'Brien refused any reduction in his salary and quit working for RHP on January 8, 2008.

On March 7, 2008, O'Brien filed a complaint against RHP alleging a cause of action for violation of Labor Code section 970, and a cause of action for IIED.² O'Brien's claims were tried to the trial court in June 2009. As noted above, the court granted RHP's motion for judgment (Code Civ. Proc., § 631.8) on O'Brien's cause of action for IIED, and found in favor of O'Brien on his cause of action for violation of Labor Code section 970. On July 7, 2009, the trial court filed a statement of decision explaining the basis for its decision. On the same date, the court entered judgment in favor of O'Brien in the amount of \$67,718.

RHP filed a timely notice of appeal.

DISCUSSION

RHP contends the trial court's finding that it violated section 970 in persuading O'Brien to work for the company is not supported by substantial evidence. We agree.

Section 970 provides: "No [employer], . . . directly or indirectly, shall influence, persuade, or engage any person to change from from one place to another in this State or from any place outside to any place within the State, or from any place within the State to any place outside, for the purpose of working in any branch of labor, through or by means of knowingly false representations, . . . concerning either: [¶] (a) The kind, character, or existence of such work; [¶] (b) The length of time such work will last, or the

² O'Brien's complaint also named RHP's controller, Charkhedian, as a named defendant. Charkhedian's liability is not addressed in O'Brien's briefs on appeal, and we find that he has abandoned his claims against Charkhedian.

compensation therefor” The necessary element of a claim for violation of section 970 is that a “promise was made without any intention to perform it, or that the defendant did not intend to perform it.” (*Tyco Industries, Inc. v. Superior Court* (1985) 164 Cal.App.3d 148, 156 [addressing section in context of a demurrer].)

Both O’Brien and RHP dedicate a significant portion of their briefs on appeal to the issue of whether O’Brien’s employment was “at will.” We find these discussions to be unhelpful. Section 970 does not include any language limiting its scope to either “at-will” or contract-based employment. The statute’s plain purpose is to protect a person from relocating for blue sky. It accomplishes this purpose by making unlawful a species of fraud in the inducement to relocate. As a result, we interpret the statute as applying equally to “at-will” and contract-based employment situations. O’Brien did not allege a cause of action for breach of contract, only for a violation of section 970, which does not necessitate any specific kind of employment relationship for a violation to occur.

The only issue presented by RHP’s current appeal is whether there is substantial evidence supporting the trial court’s finding that RHP’s representations to O’Brien about his salary and about the duration of employment — to induce him to move to California for employment — *were false at the time they were made*, i.e., that RHP never intended to honor its promises to O’Brien. In reviewing the record for such evidence, we remain mindful that a party’s intent is rarely susceptible to direct proof, and that intent may be inferred from circumstantial evidence. (See, e.g., *Tenzer v. Superscope, Inc.* (1985) 39 Cal.3d 18, 30.) Notwithstanding this allowance, we see no such evidence showing RHP knowingly misrepresented employment factors to O’Brien. At best, the evidence shows that RHP sought to change O’Brien’s salary *after* he had been working for the company for a number of months.

It is undisputed that, once O’Brien began working for RHP, the company paid him an agreed-upon salary for a period of four months, and gave him benefits beyond what had been contemplated for his employment, including loans for housing and reimbursement for legal expenses. RHP’s witnesses, Patricia Conkling, Varouj Charkhedian, and Fred Conkling, Jr., consistently testified it had been their belief and

hope that O'Brien would bring a substantial growth in business and sales to RHP. We have looked for references to the evidence in O'Brien's respondent's brief on appeal which would tend to suggest that RHP harbored an intent to misrepresent at the time it sought his services, but we see nothing which shows such a pre-employment wrong, as opposed to a post-employment change in circumstances.

In its statement of decision, the trial court found that RHP's "unilateral lowering of [O'Brien]'s salary on the first week of January 2008, along with the change in the one-year term of [his] employment, constitutes a violation of [section] 970" There is no evidence that RHP changed O'Brien's term of employment; when RHP indicated it was going to lower his salary, he quit. To the extent we construe the trial court to have found that RHP's "unilateral lowering of [O'Brien]'s salary on the first week of January 2008," showed RHP made knowing misrepresentations during the summer of 2007, we cannot agree. To the extent the court's finding is taken on its face, it is not a violation of section 970 for an employer to lower the amount of an employee's salary.

DISPOSITION

The judgment is reversed. Appellant is to recover its costs on appeal.

BIGELOW, P. J.

We concur:

RUBIN, J.

GRIMES, J.